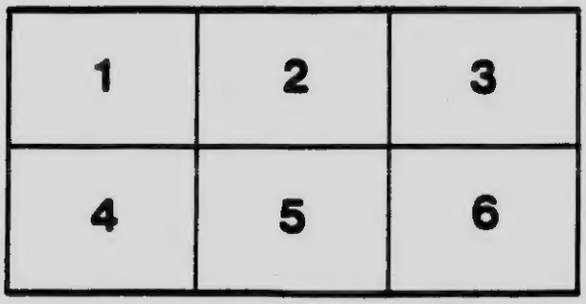

WHEN INTERNATIONAL ARBITRATION FAILED

BY

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The peace kept for more than a century by and among the English speaking peoples is the glory of the civilized world. The world truly civilized which desires to be governed by right and justice and is not blinded by the vision of *Weltmacht* or *gloire*.

Broken once since the memorable Definitive Treaty of Paris, that peace seems destined to be eternal.

And even that war avoidable and unnecessary as it was, inconsistent and ineffective from an international standpoint, absurd as it is to call it the "Second War of Independence," yet had some beneficial effect within the nations. The young Republic learned that the old Monarchy was not effete, the old Monarchy that the young Republic would fight for what was thought worth while: the United States were consolidated, Britain found in Canada a new Britain.

The peace has been kept because both parties desired only what was just; and when they could not agree on what was just, they agreed to leave the adjudication to an independent tribunal organized for the purpose. In other words, they acted as civilized men have always acted in private disputes.

The tribunal has been selected in all kinds of ways, an Emperor, a King, one arbitrator by each side, two arbitrators by each side and an umpire, &c., &c., and there have been at least twenty-two references to such tribunal by the United States on the one hand and Britain (including Canada) on the other. In all but three of these cases the tribunal has made an award which was accepted by the parties. Sometimes indeed there were protestations, objections, hints if not threats of refusal to abide by the award but always when the

time came the award was submitted to—saying they would never consent they consented. The first of these failures is the occasion of this article, the other two are simple and are on the same subject matter. They may be disposed of first.

When the Treaty of Paris, 1783, was in process of negotiation, there was little knowledge on the part of the Americans and less on the part of the British representatives of the topography of the territory now the northern part of Maine. They adopted for the dividing line between the United States and the British territory the description which twenty years before had been employed by the British Government for the southern boundary of the "Government of Quebec" formed by the Royal Proclamation of October 7, 1763, out of the conquered "New France" or Canada. Article II. of the Definitive Treaty described the boundary line in the existing terminology "along the . . . Highlands which divide those rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean."

In 1805 a Commission to settle this line was agreed to by Lord Hawkesbury (afterwards Earl of Liverpool) and Rufus King, but this failed of ratification by the Senate; nor could the Commissioners when negotiating the Treaty of Ghent, 1814, agree. By that Treaty, Article V., it was left to the determination of two Commissioners, one to be appointed by each nation; if these commissioners could not agree, there was to be a reference to a friendly Sovereign or State.

The American commissioner was Cornelius P. VanNess, afterwards Chief Justice and Governor of Vermont; VanNess has not been generously treated in American Cyclopedias and other works of reference. He was a man of great capacity; during Jackson's administration he was Minister to Spain and conducted the negotiations concerning the American claims under the Treaty of 1819, &c., resulting in the VanNess convention of 1834. His vigorous stand in favour of the extended boundaries of the United States in the

arbitration concerning the Highlands has been blamed for the non-success of that proceeding; *sub judice lis est*. The British Commissioner was Colonel Thomas Barclay of Annapolis, Nova Scotia, who, born in the Colony of New York, had studied law under John Jay but had taken the Loyalist side in the Revolutionary struggles, had fought for his principles and when all was lost went to Nova Scotia, practised law and became Speaker of the Legislative Council. They could not agree and so reported, April, 1822.

In 1827-8, a convention was concluded to refer the matter to a "friendly Sovereign or State"; and William, King of the Netherlands, was selected as the "Arbiter" or arbitrator. He made an award, January, 1831; but instead of finding the line as described in the Treaty of 1783 he adopted what he considered to be a convenient line. King and resident "des Pays Bas" he failed to appreciate "Highlands," Britain acquiesced; the United States was undecided. Jackson was inclined to accept the award and afterwards regretted that he had not done so. The Senate in June, 1832, advised the President to open further negotiations with Britain, and Britain agreed. The award went by the board.

Finally Webster and Lord Ashburton agreed on a line and it was fixed in the Ashburton Treaty of 1842.

The facts of the third failure are rather more complicated.

By the Definitive Treaty of 1783, all the territory on the right of the Great Lakes and connecting rivers was allotted to the United States; by Article V. Congress agreed to recommend the States to provide for the restitution of the property belonging to "real British subjects" which had been confiscated. South Carolina made an attempt to carry out this recommendation; the other States were recalcitrant. Article IV. provided that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore

contracted. Many States had passed legislation preventing the payment of British creditors and refused to correct the wrong. Britain kept possession of the posts along the Great Lakes, &c., Michilimackinac, Detroit, Buffalo, Niagara, Oswego, Oswegatchie, Pointe au Fer and Dutchman's Point; and she refused to give them up, alleging as the reason that the United States had not kept the contract.

There was infinite danger in the situation, danger was to be feared from the Indians—a great deal has been said on both sides of the intrigues of the other people with the Indians; but one cannot read the correspondence of the day without recognizing that both appreciated the danger and horror of Indian warfare and avoided it as much as possible. It is true, however, that at all times and in times of great peril, they more eagerly adopted the help of the Indians. *Necessitas non habet legem.* It is idle to lay all the blame on one side only, as is too frequently done by those who call themselves historians. While restrained by both Governments officially the Indians at times were egged on by individuals on both sides and they did not require any urging. There was always peril of an armed clash between the soldiers and traders of both countries. Other sources of heart burning were in abundance; and at length Washington sent John Jay, the Chief Justice of the United States, to England and he negotiated the celebrated Jay's Treaty of 1794. I do not say anything of the howl of execration with which this Treaty was greeted by the political party opposed to the President; Jay, than whom a purer statesman and judge never lived, was branded as a traitor and renegade. He lost the prize for which he lived, the Presidency of the United States. Washington did not offer himself for a third term and hence the tradition against third terms; possibly he knew or believed that he would not be elected.

By that Treaty the United States was to obtain the territory given by the Treaty of Paris, Britain to

abandon the Posts on or before June 1, 1796: and the United States was to pay the debts improperly detained. Article VI. provided for a Board of five Commissioners, two appointed by the King, two by the President and the fifth by lot; they were to swear "honestly, diligently, patiently and carefully (to) examine and to the best of my judgment according to justice and equity decide all such complaints as . . . shall be preferred to the . . . Commissioners."

The Presidents appointed Thomas Fitzsimons, of Pennsylvania and James Innes, of Virginia; the King, Henry Macdonald and Henry Pye Rich. They met at Philadelphia May 18th, 1797, opened the Commissions and adjourned for a week to select a fifth Commissioner; the practice was adopted which had already been followed in another arbitration under the same Treaty. The British Commissioners gave to their American confreres the names of three British subjects then in America of whom the Americans were to choose one; and the Americans did the same with the British. The American selected John Guillemard, of London, then in Philadelphia, and the British Commissioners selected Fisher Ames of Massachusetts. When the Commissioners met at the house of Fitzsimmons on May 25th, the British Commissioners proposed Guillemard, the Americans Ames; Rich and Innes retired into another room and Macdonald and Fitzsimons wrote the names of Guillemard and Ames on separate slips of paper which were then rolled up, placed in an urn, and carried by Macdonald and Fitzsimons to the other two; the urn was handed to Innes and by him to Rich, who thereupon in the presence of the other Commissioners drew out one paper; this was found to bear the name of John Guillemard, who thereupon became the fifth Commissioner.

Of Macdonald and Rich nothing seems to be known; wholly unknown to fame they do not appear even in the voluminous Dictionary of National Biography. Macdonald, William Pinkney thought " an amiable, well-informed gentleman . . . with . . . the best disposition

towards our country." Life of Pinkney, p. 29, a letter from William Pinkney to W. Vans Murrary, London, February 9th, 1797. See also John Bassett Moore's History and Digest of International Arbitrations, &c.," Washington, 1898, p. 279 (*n*), but some complaint was afterwards made of his arbitrariness.

Of the American Commissioners Fitzsimons is equally unknown; Innes was an intimate friend of Washington and a man of the highest character.

The Commission met May 29th, 1797, to take the oath prescribed and to constitute the Board.

The first meeting for business was also in Philadelphia, and on January 24th, 1798, was partially heard a Maryland claim; after a meeting on February 7th, the Board, April 18th, made a formal announcement that they would consider no policy but justice in disposing of claims before them. May 21st, they decided that confiscation of debts by the State of New York was no bar to the claim of the Right Reverend Charles Inglis, Bishop of Nova Scotia. In July the legislation of South Carolina came in question; that State March 26th, 1784, passed an Act prohibiting in January 1st, 1785, any suit or action in equity or at law for any debt, &c., of a citizen of the United States before February 26th, 1782; after January 1st, 1785, only the interest accrued since January 1st, 1790, should be recoverable, after January 1st, 1786, such other interest as might be due and one-fourth of the principal, after January 1st, 1787, 1788 and 1789, the other three-fourths respectively with accrued interest. Another Act passed March 28th, 1787, provided that (with certain exceptions) all debts contracted before January 1st, 1787, should be recoverable by instalments only; one-third and interest on March 1st, 1788, one-half of remaining principal and interest March 1st, 1789, and the balance March 1st, 1790.

November 4th, 1788, another Act was passed, making the instalments one-fifth instead of one-third; and further directing that on a Sheriff's sale the purchaser might pay either in specie or in paper money,

i.e., "Continental" money, "not worth a continental."

This was unanimously held a lawful impediment to the recovery of debts within the meaning of Jay's Treaty.

Colonel Innes died August 2nd, 1798, and was succeeded by Samuel Sitgreaves of Pennsylvania August 11th, who took his seat August 28th, 1798. Sitgreaves was a lawyer of some note, born in Philadelphia in 1764 he began practice in Easton 1786, was a member of the Pennsylvania Legislature 1789-90, a member of Congress 1794-6. He conducted the impeachment of William Blount in 1797 and the prosecution for treason of John Fries in 1799. (See John Bassett Moore's History and Digest, p. 278 (*n*)). Almost at once there occurred unpleasant and unfortunate disagreements.

After the death of Innes and before the appointment of Sitgreaves, legislation of Virginia had come before the Board and the Board had by a majority decided that such legislation came within the Treaty. Fitzsimons dissented. On the same day Legislation for Maryland came up and was similarly decided. "Mr. Fitzsimons, who had earnestly opposed the opinion of the three other members in favour of the claim . . . entered a protest on the journals in which he asserted that the above opinion of the three other members was not only unjust but 'manifestly unjust'; and accordingly he gave no reasons for the charge."

This decision was in the case of Daniel Dulany, residuary legatee of a testatrix who died in Maryland December, 1775; he complained of a law of Maryland authorizing the debtor to pay and requiring the creditor to receive paper money for debt; and it declared the debt extinguished if tender in paper money was refused. The contention of Fitzsimons was that not Dulany but the executor was the creditor, that he was an American citizen and Dulany had no rights higher than the executor and besides the executor had under compulsion of the said law given up the security and consequently the debt was extinguished by the act of the creditor not

by operation of law. Everyone must decide for himself on which side lay the "manifest injustice."

On December 18th, the case of William Cunningham & Co. came on for consideration; they complained of the practice of courts and juries deducting more than one-third of all debts bearing interest and denying interest in every case during the period of the war. "The Board on full argument resolved (Mr. Fitzsimons and Mr. Sitgreaves dissenting), that the war could not justify any such general rule." February 19th, 1799, matters came to a climax; the case of the Bishop of Nova Scotia came on for adjudication. The American Commissioners considered that he was guilty of manifest negligence in not having proceeded at law for the recovery of his debt, and that he was bound still to go through a course of judicial proceedings for that purpose before he could claim before the board. The other three were clear that at and before the Treaty he could not have recovered, and indeed that was perfectly clear, and that he was not *now* obliged to go through a course of judicial proceedings, to try the experiment whether the Courts would decide differently from the decisions given before the Treaty. Which of those opinions is the more in accordance with "justice and equity" mentioned in the oath of the Commissioners everyone may determine for himself. Does it require argument?

And now occurred a proceeding wholly novel. We have seen that Fitsimons had orally dissented in one case and entered a written protest in another; also that he and Sitgreaves had dissented in a third. That kind of objection was now considered no longer sufficiently strong, and another and more effective measure was adopted.

The Treaty had provided that three of the Commissioners should form a Board "provided that one of the Commissioners named on each side and the fifth Commissioner shall be present and all decisions shall be made by the majority of the voices of the Commissioners then present." The purpose of this provision is, of course, manifest; no claim should be disposed of

by the Board without the opportunity of at least one commissioner on each side being present. The umpire and the two appointed by one side should not have the power to deal with any claim in the absence of some one on the other side.

But the American Commissioners took advantage of this provision for another purpose. When a resolution was submitted which they saw would carry but which they did not approve of, they did not dissent, they withdrew to prevent a vote. Once again everyone must decide for himself of the justice and equity, honesty and impartiality of such a course. Claims thereafter were unanimously dismissed on Vermont, New Jersey and other legislation; in one case the legislation of Virginia was held a lawful impediment but the right to recover was reserved and this was never decided; in one case after considerable opposition and argument the American Commissioners agreed to concur with the other three members in giving an award in a Maryland case for the full amount of the claim; but they distinctly and formally declared that when they could not in any other way prevent a decision against what they thought the just rights and interests of the United States they would secede to prevent a vote.

The other three placed their conception of their duty in the form of a resolution declaring that the Commissioners appointed by the King were equally charged with the rights of the United States as with those of Great Britain or British subjects, and the American Commissioners in likewise—that all the arbitrators were bound under oath to decide with perfect impartiality and without regard to how they were appointed or " the manner in which the opinion he is bound in consequent to give, may affect the . . .parties." "This declaration was proposed by three members of the Board and so recorded, but Mr. Fitzsimons and Mr. Sitgreaves thinking it their duty to prevent it from being passed by a vote, again seceded or withdrew."

And they thereafter withdrew and prevented a vote when they could not carry their point. Finally, July 19th, they caused to be delivered to the other three Commissioners a letter declaring a determination "under the existing circumstances not to give their further attendance" in the Board. Six weeks afterwards, September 3rd, they gave their reasons in a letter of fifty-five pages. The substance was that no claim by any British subject was good without the concurrence of the American Commissioners and the suggestion was that the award in favour of claimants by the three Commissioners were radically erroneous and bad while all the determinations in favour of the United States were perfectly well founded. Thus the arbitration failed.

The Governments took up the matter in the regular diplomatic channels and at length by the Convention of January 8th, 1802, it was agreed that the United States should pay £600,000 sterling (at $4.44 to the pound sterling); this sum was duly appropriated and paid.

Osgoode Hall, Nov. 29th, 1919.

NOTE.—Those interested cannot do better than consult a little book, "A Brief Statement of Opinions given in the Board of Commissioners, &c., &c., Philadelphia, 1800"; also John Bassett Moore's monumental and invaluable work, already cited.